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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
No. 75-1914

JANE MONELL, et al.,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

On writ of certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS

W. BERNARD RICHLAND
Corporation Counsel of the
City of New York,
Attorney for Respondents,
Municipal Building,
New York, N.Y. 10007.

L. KEVIN SHERIDAN,
of Counsel.

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BRIEF FOR RESPONDENTS

STATEMENT

On January 11, 1977, this Court decided Mt. Healthy City School District Board of Education v. Doyle, ___ U.S. ___, 97 S.Ct. 568, expressly leaving open for future determination the question of whether school districts and boards, like cities and counties,

are not "persons" within the meaning of 42 U.S.C. §1983. See 97 S.Ct. at 572.

Two weeks later, on the application of the instant petitioners, this Court granted certiorari to review the holding of the United States Court of Appeals for the Second Circuit (Pet., pp. A28-A70) that (1) the New York City Board of Education is not a person within the meaning of §1983 and (2) what would in effect be damages could not be awarded under §1983 against either the respondent Board of Education of the City of New York or the City itself by the device of naming as defendants in such a suit governmental officials sued only in their official capacities, and by the further device of characterizing such monetary relief as merely "equitable restitution."

The Court of Appeals, because of its

disposition of the appeal, did not reach arguments urged by the respondents (appellees there) that (1) assuming arguendo the existence of a right to such "equitable" relief, petitioners herein had failed to name as defendants the proper public officials and (2) this was not a proper case for class relief (see Brief of Appellees in Court of Appeals, Points III and V).

QUESTIONS PRESENTED

(1)

On the issue of whether the respondent Board of Education of the City of New York is a person within the meaning of §1983, petitioners urge (1) on the basis of numerous decisions wherein, without discussion of this issue, relief has been granted in §1983 actions against school boards or districts, that, under principles of stare decisis, such bodies should be held persons for this

purpose and (2) apparently accepting that such entities are as much creatures and governmental subdivisions of States as are cities and counties, that this Court's decisions on this issue in Monroe v. Pape, 365 U.S. 167 (1961), and Moor v. County of Alameda, 411 U.S. 693 (1973), were incorrect and the "unsupportable" reasoning of those cases (Petitioners' Brief, p.7) should not be extended to exclude school boards or districts from liability under §1983.

(2)

With respect to the issue of whether damages* may be awarded against governmental entities not persons within the meaning of §1983 by the device of allowing suits against

*We note that in their Amended Complaint (Appendix, 3-27) petitioners characterize the monetary relief they here seek as "damages," not any type of "equitable" relief (id. p.26). We also note that the Amended Complaint does not pray for "reinstatement" of any of the petitioners.

officials of such entities sued only in their official capacities, petitioners urge that (1) albeit without discussion, this Court has in past decisions approved such "equitable" relief (Petitioners' Brief, pp. 41-46) and (2) the authority to award such relief may and ought to be read into §1983 in order that it may fulfill its "central purpose" (id., p.50).

SUMMARY OF ARGUMENT

We urge in point "I" of our argument that (1) Monroe v. Pape and Moor were in fact correctly decided and in any event should be adhered to under principles of stare decisis; (2) school boards and districts generally, to the extent they are not deemed arms of the State, enjoying Eleventh Amendment immunity from suit, are governmental subdivisions of the States, exercising important governmental power,

and, accordingly, should be treated the same as cities and counties under §1983; (3) with particular reference to the Board of Education of the City of New York, such is its close relationship to the City of New York that there is no basis for treating it differently from the City itself.

In "II" we argue that acceptance of petitioner's argument for imposition of liability for "damages" on non-person governmental entities by the device of allowing officials thereof to be sued in their official capacity and the further device of characterizing such monetary relief as "equitable" would be (1) inconsistent with Monroe v. Pape and Moor; (2) inconsistent with the intent of the Congress that enacted §1983; and (3) contrary to sound considerations of justice and public policy. We recognize that prospective in-

junctive relief can in fact be obtained against such entities, but by analogy to the Eleventh Amendment cases we urge that monetary relief of the type here sought is improper.

ARGUMENT

I

THIS COURT'S PRIOR HOLDINGS THAT CITIES AND COUNTIES ARE NOT "PERSONS" FOR PURPOSES OF 42 U.S.C. §1983 ARE SUPPORTED BY THE LEGISLATIVE HISTORY OF THAT SECTION AND, IN ANY EVENT, UNDER PRINCIPLES OF STARE DECISIS SHOULD BE ADHERED TO.

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(1)

Twice before this Court has considered in detail the legislative history of the Ku Klux Act of 1871, what is now 42 U.S.C. §1983. Based upon such consideration, it has determined that it was not the inten-

tion of the Congress that enacted this statute that it should impose liability on governmental subdivisions of States. See Monroe v. Pape, supra; Moor v. County of Alameda, supra; see, also, City of Kenosha v. Bruno, 412 U.S. 507 (1973).

We believe that those readings of the relevant legislative history are fully supported by the record of the congressional debate on the Sherman Amendment. That debate reveals at least two distinct strains to the argument against imposition of such liability: One, at least certain members were concerned about the effect imposition of such liability would have on municipal treasuries. See City of Kenosha v. Bruno, supra, 412 U.S. 507, 517-519 (Douglas, J., dissenting). Two, other members were concerned that Congress did not possess the power to impose such liability upon political

subdivisions of the States. See Monroe v. Pape, supra, 365 U.S. 167, 190; Moor v. County of Alameda, supra, 411 U.S. 693, 708. This reading of §1983 is supported not only by its legislative history,* but also by the principle of stare decisis.**

We appreciate, as this Court has, the

*This reading of the legislative history is supported by other evidence as well. See "The Supreme Court, 1972 Term," 87 Harv. L. Rev. 1, 257 n.29 (1973). As is also there noted, in Monroe v. Pape this Court expressly rejected the "Dictionary Act" argument which is tendered anew in this case. See 365 U.S. at 190-191.

**As noted, in Monroe v. Pape and Moor this issue was explored in depth. In neither Monroe v. Pape nor Moor, nor in City of Kenosha v. Bruno, was there even a single dissent on this issue. In the 16 years since Monroe v. Pape was decided, Congress, although it has been most active in the field of civil rights, has not chosen to amend §1983 to include State subdivisions as persons under that statute. Cf. Illinois Brick Co. v. State of Illinois, __U.S.__, 45 U.S.L.W. 4611, 4615 (1977).

distinction between the type of strict liability which would have been imposed on municipalities by the amendment proposed by Senator Sherman (see Monroe v. Pape, supra, 365 U.S. 167, 188 n. 38), as well as its later proposed version (id., pp. 188-189 n.41) and the situation where a municipality would be held liable on the basis of traditional principles of respondeat superior (compare Moor v. County of Alameda, supra, 411 U.S. 693, at 698-702). Moreover, we do not here question the power of Congress to impose liability on governmental subdivisions of States on such a theory for civil rights

violations committed by their employees.* Nonetheless, as this Court noted in Moor, the legislative history of this Act indicates that "the House arrived at the firm conclusion that Congress lacked the constitutional power to impose liability upon municipalities..." (411 U.S. at 709), and, in any event, the proposal to impose liability upon towns and counties was "rejected in toto" (id., at 710).

Either no such middle ground resolu-

*Although we do not believe this distinction is here critical, it should be noted that in this case petitioners do not seek merely imposition of vicarious liability for "torts" committed by public officials who would themselves be personally liable to petitioners; petitioners concede that none of the individual respondents could be held personally liable to them. Compare Monroe v. Pape, supra, where the individual police officers were themselves charged with tortious conduct. Instead, petitioners seek imposition here of a type of strict liability, different from that which would have been imposed under the Sherman Amendment, but which is still a species of strict liability which would operate most harshly.

tion of the question of municipal liability under the then proposed act occurred to the Congress, or, if it did occur to it, such "solution" was rejected. And, indeed, the legislative debate quoted by Mr. Justice Marshall in footnote 24 of his opinion in Moor (at pp. 708-709) appears clearly to suggest that even had such a middle ground solution occurred to that Congress, the House members would have viewed it as still beyond the power of Congress. See, also, Monroe v. Pape, supra, 365 U.S. 167, at 190, quoting Representative Poland:

> "'[T]he House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.'" (Emphasis supplied.)

(2)

With respect to the question of whether

school districts or boards should enjoy the same "non-person" status for purposes of §1983 as do cities and counties, we would note initially that where, as here, the defendant school board is funded directly out of a municipal treasury there is presented an a fortiori case for non-liability based on the congressional concern for municipal treasuries which Mr. Justice Douglas has stressed in his reading of the legislative history of §1983. See infra, pp. 18-22. However, on the level of what would appear to have been a more fundamental concern of that Congress, we would note that there is absolutely no basis in terms of the 1871 Congress's view of the limited reach of its power over State subdivisions for distinguishing between school boards and districts and other State subdivisions.

Clearly, while school boards and dis-

tricts may not, within the meaning of the Eleventh Amendment, be "arm[s] of the State" (Mt. Healthy City School District Board of Education v. Doyle, supra, 97 S.Ct. at 572), like cities and counties, they are creatures and agencies of the State, as a means of exercising its political power, and they fulfill an important governmental role.* As such, under the theory of constitutional limits on congressional power which in-

*See, generally, concerning the status of school boards and districts under the laws of the various States, 16 McQuillin, Municipal Corporations §46.03. It should be noted that in National League of Cities v. Usery, 426 U.S. 833 (1976), this Court did not distinguish between schools (and hospitals) and other governmental subdivisions of States. See id. at p. 855. On the contrary, the Court specifically noted that such entities provide "an integral portion of those governmental services which the States and their political subdivisions have traditionally offered their citizens." Id. Cf. Village of Kenmore v. County of Erie, 252 N.Y. 437, 442, 169 N.E. 637, 639 (1930) ("School districts are, like counties, governmental subdivisions of the State, though their function is confined to education").

fluenced the Congress that enacted §1983, there is no basis for distinguishing between this type of State subdivision and cities and counties, and the legislative history quoted by Mr. Justice Marshall in Moor clearly supports such a view. See 411 U.S. 693, 708 n. 24.* Moreover, any other view would create chaos and confusion in the law, and invite constant litigation on the question of whether a particular public education entity is or is not a "person" for purposes of §1983. In terms of logic, adherence to legislative intent and considerations of policy, we can see no reason for

*As is there indicated, Representatives Kerr, Willard and Poland uniformly believed that the power of Congress to act in this matter extended only to individuals, not subdivisions of the States. And it is noteworthy that they spoke most broadly when discussing such subdivisions. Thus, for example, Representative Willard referred to "a county, city, parish, or any other subdivision of a State" (id., p.708).

treating such entities any differently from towns, cities and counties for purposes of §1983. And neither petitioners nor the amici here have suggested any basis for such a distinction -- other than blind adherence to precedents where this issue was not considered and their belief that Monroe v. Pape and Moor were improperly decided and should not be extended.

Insofar as precedent and the doctrine of stare decisis are concerned, this Court has already indicated quite clearly that this question has yet to be definitively decided by it. See Mt. Healthy City School District Board of Education v. Doyle, supra, 97 S.Ct. 568, 572. Furthermore, it has also indicated the slight precedential weight to be accorded earlier cases involving issues of this sort where such issues were not raised either by the parties or the Court.

See Monroe v. Pape, supra, 365 U.S. 167, 191 n. 50; see, also, City of Kenosha v. Bruno, supra, 412 U.S. 507, 512-513. Compare Edelman v. Jordan, 415 U.S. 651, 670-671 (1974).

If this Court feels that Monroe v. Pape, Moor and City of Kenosha were properly decided, in accordance with the intentions of the Congress that enacted this statute (cf. Moor v. County of Alameda, supra, 411 U.S. 693, 709), then, we submit, there is no avoiding here the reach of the analysis employed in those decisions to encompass school boards and districts.*

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*In the point that follows we discuss the policy considerations which support the result which we here urge as to both school boards and other governmental subdivisions. We would note here, however, that we are aware of no important holding of this Court in the field of public education which would have been barred by adoption of the rule we urge.

Entirely apart from what we have said in regard to school boards and districts generally, we submit that the respondent Board of Education of the City at New York is so clearly part and parcel of the City itself as to require the same exclusion from §1983 as the City itself.

Fiscally, the Board is clearly nothing but another department of City government. It has no independent taxing authority or authority to issue bonds, and it is through the City Expense and Capital budgets that the Board's operations and growth are funded.

Moreover, the City's relationship with the Board of Education goes far beyond merely the question of fiscal affairs. The Board is included in the City Charter as one of the board's or departments of City government.

See New York City Charter, §§520-527. Its members are appointed by the mayor (two) and the five borough presidents (one each). Education Law §2590-b(1)(a). Title to property used for the Board's purposes is vested in the City. New York City Charter §5[illegible]1. The Board is required to submit yearly reports to the mayor. Id. §522. Its members may be removed by the mayor for cause following a hearing. Id. §523. The City's chief law officer, the corporation counsel, represents the Board. See Matter of Kingsport Press v. Board of Education of the City of New York, 52 Misc 2d 276, 277-278 (Sup. Ct., N.Y. Co., 1966). And the City's Commissioner of Investigation (see City Charter §801 et seq.) is authorized to investigate charges of or suspected wrongdoing in the conduct of the Board's affairs. Karelsen v. Wagner, 59 N.Y.S. 2d 683 (Sup. Ct., N.Y. Co., 1945).

In addition, while for educational and pedagogical purposes the Board is considered an agency of the State (Matter of Maloff v. City Comm'n. on Human Rights, 38 NY 2d 329, 332, 342 N.E. 2d 563, 565 [1975]; Lanza v. Wagner, 11 NY 2d 317, 326, 183 N.E. 2d 670, 675 [1962]), for other purposes the Board has been treated as a department of City government. See Matter of Maloff v. City Comm'n. on Human Rights, supra, 38 NY 2d 329, 332-333, 342 N.E. 2d 563, 565; Daniman v. Board of Education, 306 N.Y. 532, 541-543, 119 N.E. 2d 373, 379 (1954), rev'd on other grounds sub nom. Slochower v. Board of Education, 350 U.S. 551 (1956); Matter of Hirshfield v. Cook, 227 N.Y. 297, 125 N.E. 504 (1919).

In short, while this is a separate corporate entity, for certain purposes independent of the City's control (and for

others subject to it), it is clear that the relationship between the Board of Education and the City is most close, and that this is especially so in fiscal matters. Quite clearly, if what are in effect money judgments are to be allowed in §1983 actions against this respondent, such judgments will ultimately be paid by the City's taxpayers out of the City treasury. Such a result would be, we believe, altogether inconsistent with Mr. Justice Douglas's reading of the legislative history of §1983. See City of Kenosha v. Bruno, supra, 412 U.S. 507, at 517-519. And, perhaps more fundamentally, it would be inconsistent with the view that this section was not intended to reach governmental subdivisions of the States. See Moor v. County of Alameda, supra, 411 U.S. 693, at 708 note 24; Monroe v. Pape, supra, 365 U.S. 167, at 190. Compare Vil-

lage of Kenmore v. County of Erie, supra, 252 N.Y. 437, at 442, 169 N.E. 637, at 639.

To the extent that this entity may be viewed as part of the City's government it should be held to share in the City's immunity from suit under §1983. To the extent the Board is viewed as separate from the City, we would note that boards of education have been compared to counties by the New York Court of Appeals (id.), and both that court (id.) and this Court have recognized that such entities perform a significant governmental function (National League of Cities v. Usery, supra, 426 U.S. 833, at 855).

Accordingly, while we here urge that boards of education and school districts generally should be viewed as not persons for purposes of §1983, we urge most strongly that, whatever view may ultimately be adopted

as to such entities generally, in this case the New York City Board of Education should be held, like the City of New York itself, not a person for purposes of §1983.

II

CONSISTENT WITH THE PREVIOUSLY EXPRESSED VIEW OF THIS COURT THAT §1983 SHOULD BE ENFORCED AS THE CONGRESS THAT ENACTED IT INTENDED IT TO BE ENFORCED, AND AS THAT VIEW HAS BEEN ACQUIESCED IN BY CONGRESS, THAT STATUTE SHOULD NOT BE HERE ENFORCED SO AS TO ALLOW WHAT WOULD BE IN EFFECT DAMAGE AWARDS AGAINST STATE SUBDIVISIONS.

(1)

In both Monroe v. Pape and Moor this Court indicated that §1983 should be construed in accordance with the intention of the Congress that enacted this statute. In both of those cases this Court squarely held that that Congress did not intend to impose liability under the Act on subdivisions of States. This holding of Monroe v. Pape is crystal clear. In the 16 years

since that case was decided Congress has not chosen to legislatively overrule that holding. Compare Illinois Brick Co. v. State of Illinois, supra, 45 U.S.L.W. 4611, at 4615.

Notwithstanding those clear holdings, petitioners urge that §1983 should be construed so as to directly frustrate that congressional intent. Very respectfully, we submit that for this Court to so construe this statute would not only be violative of the principle of stare decisis, but also it would constitute a usurpation of the legislative function. See Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. 527, 533 (1947). Moreover, we submit, such a construction of §1983 would make bad law.

Increasingly, this act, known as the Ku Klux Act and directed against outright

criminal behavior, as well as invidious State legislation and the failure of the States to provide adequate remedies (Monroe v. Pape, supra, 365 U.S. 167, at 172-174), has been utilized by this Court and the lower federal courts to announce new standards of what the due process and equal protection guarantees require. Most often in recent years the official conduct complained of was not motivated by any criminal or invidious purpose, and in many instances, such as was here the case, the challenged conduct "no doubt represent[ed] a good-faith attempt to achieve a laudable goal" (Cleveland Board of Education v. LaFleur, 414 U.S. 632, 648 [1974] [like this case involving the issue of mandatory maternity leave]).

Under these circumstances, where declaratory and prospective injunctive relief, including preliminary injunctive relief,

is available against public officials sued in their official capacities, and in certain cases such officials may themselves be cast in damages for violations of §1983 (see, generally, Wood v. Strickland, 420 U.S. 308 [1975]), we believe it is entirely appropriate that §1983 should not be allowed to be used as a means of recovering judgments payable out of local governmental treasuries, but rather should be confined in its application within the limits to which this Court has repeatedly indicated it should be kept.*

*The availability of preliminary injunctive relief in a §1983 action, with an appeal as of right being available where the district court denies such relief (28 U.S.C. §1292(a)(1)), certainly undercuts petitioners' argument that a retroactive monetary award is essential if §1983 is to achieve its "central purpose" (Petitioners' Brief, p. 50). Any party who feels aggrieved by some official action may apply for preliminary injunctive relief and, if he can make the requisite showing, he or she should obtain it. In addition, it might be noted that the unavailability of monetary awards against the States has not significantly deterred parties from seeking relief under §1983 against State officials.

So confined, §1983 is not stripped of its vitality; it may still be used as a potent "sword, rather than merely as a shield" (Edelman v. Jordan, supra, 415 U.S. at 664) against wrongdoing or error on the part of public officials -- without, however, causing injustice.

In effect, under this Court's decisions construing and applying §1983 there have been recurrent "sunbursts" (see Great Northern Ry. v. Sunburst Oil and Refining Co., 287 U.S. 358 [1932]), where this Court, functioning very much like a traditional common law court, has announced new rules of law. Under such circumstances it is essential that §1983 be applied in a fair and balanced fashion so that the rights and obligations of plaintiffs and defendants may be equitably determined and injustice avoided. Compare Schaeffer, "Precedent and Policy," 34 U. of

Chi. L. Rev. 3, 14-18 (1966). At root, this appears to be the concern which has animated a number of this Court's decisions construing §1983, see, e.g., Wood v. Strickland, supra, 420 U.S. at 316-322; Imbler v. Pachtman, 424 U.S. 409 (1976), and, while the immunity we here seek for governmental subdivisions is different in kind from the qualified immunity discussed in Wood v. Strickland, this is merely another means of arriving at a result which, on balance, would appear just and appropriate. Moreover, it is the type of immunity which in another context this Court only recently held, based upon traditional common law and public policy considerations, should be provided to a §1983 defendant. See Imbler Pachtman, supra (absolute prosecutorial immunity). More importantly, recognition here of such an immunity from liability under

§1983 does not require engrafting onto this statute any common law exception to liability (compare Imbler v. Pachtman, supra, 424 U.S. at 417-419); rather, it merely requires that the statute not be contorted to avoid the clear intent of the Congress that enacted it. Clearly, we submit, the analogy here to Edelman v. Jordan, supra, 415 U.S. 651, is most compelling. By applying that analogy to §1983 suits against officials of State subdivisions the intent of Congress can be served and injustice avoided.

(2)

In arguing for recognition of such immunity we are aware that (1) there is respectable judicial authority to the contrary (see, e.g., Muzquiz v. City of San Antonio, 528 F. 2d 499, 501-503 [5th Cir., 1976], pet. for cert. pending [Tuttle, J., dissenting]) and (2) the precise scope of

the protection accorded by such immunity from suit may not always be perfectly clear (see, e.g., id. at 503-504 [Thornberry J., concurring and dissenting]; id. at 504-505 [Godbold, J., concurring and dissenting]; compare Edelman v. Jordan, supra, 415 U.S. 651, at 667).

With respect to the first of these points, we would simply note that such authority, where it is reasoned at all, totally ignores the legislative history of §1983 and the intent of the Congress that enacted this statute (see, e.g., Judge Tuttle's Muzquiz dissent), which intent this Court held in Monroe v. Pape and Moor had to be given effect in construing §1983.

With respect to the second problem, determining the scope of the protection accorded, we acknowledge that in particular

cases this issue may present difficulty.* But such difficulty does not excuse giving effect to the intent of Congress, and in fact is not insuperable. Indeed, we believe, the guide for resolution of this issue is already available, furnished by the Eleventh Amendment cases, where this Court has recognized that orders may be entered against State officers which have impact on State treasuries (Edelman v. Jordan, supra, 415 U.S. at 667), but has held that such orders are limited to "prospective injunctive relief" (id. at 677) and "may not include a retroactive award which requires the pay-

*In this case no such difficulty is presented. In their amended complaint petitioners quite properly characterize the monetary relief they seek as "damages" (Appendix, p.26), and quite clearly the "equitable" order they now seek would be "tantamount to a money judgment" (Muzquiz v. City of San Antonio, supra, 528 F. 2d at 501). Compare Edelman v. Jordan, supra, 415 U.S. at 668.

ment of funds from the state treasury" (id.).

The very same approach would be appropriate here; it would both respect the intent of Congress and not render meaningless this Court's decisions in Monroe v. Pape and Moor. Moreover, it is an approach which by and large would do justice.

Just as public officials have not been required to be prophets with respect to further refinements in constitutional law, and have been accorded varying degrees of immunity from awards for damages based on their official acts, municipalities and similar governmental entities should be protected from liability for acts performed by their officers and employees pursuant to long accepted policies which only much later have been held to be unconstitutional.

Concededly, not all acts of public officials have been as innocent as those

involved here, and in the case of wrongful acts committed by such officials within the scope of their employment, where such officials would themselves be liable, an argument could be made for the imposition of respondeat superior liability. However, we believe such cases are in fact the exception, in a situation where what is called for is a rule of general application. Cf. Imbler v. Pachtman, supra, 424 U.S. 409. And, in any event, as we have noted, no such middle ground approach to the question of municipal liability was adopted by the Congress that enacted §1983. See Moor v. County of Alameda, supra, 411 U.S. at 710. Accordingly, to the extent this was not already done in Monroe v. Pape and Moor, should this Court in this case determine that it must announce a general rule on the issue of liability of governmental subdivisions

under § 1983 for acts of their employees, both innocent and wrongful, then we submit that it has no logical alternative other than to announce here a rule of absolute immunity.

Truly, there has taken place in this country in the past quarter-century a revolution in the field of civil rights, and a most welcome revolution. But that revolution should not exact from hard pressed localities and their limited treasuries retribution for past acts which were by and large generally considered perfectly lawful and over which, as a practical matter, citizens and taxpayers had little control.

Both "common-law tradition" and "strong public policy reasons" (Wood v. Strickland, supra, 420 U.S. at 318), as well as precedent and the intent of Congress, counsel here against allowing in a § 1983 action relief

of the sort which these petitioners seek. Quite to the contrary, all of these considerations argue for this Court's holding that under §1983 State subdivisions enjoy an immunity from suit similar to the immunity from suit enjoyed by the States under the Eleventh Amendment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

July 11, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Respondents.

L. KEVIN SHERIDAN,
of Counsel.